TAN GEOK LAN

v.

LA KUAN

FEDERAL COURT, KUALA LUMPUR
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL HAMID MOHAMAD FCJ
MOHD NOOR AHMAD FCJ
[CIVIL APPEAL NO: 02-8-2003 (W)]
2 APRIL 2004

CIVIL PROCEDURE: *Settlement - Agreement by parties to resolve issues of fact - Whether agreement amounts to a contract - Whether binding on parties - Whether binding despite not being recorded as consent order or judgment - Whether trial judge should have given effect to agreement - Whether parties should have been allowed to resile from agreement - Whether decision to disregard agreement and proceed with trial injudicious - Urgent need for expeditious disposal of cases in civil litigation - Whether agreement an attempt by parties to dictate the terms and procedure of the trial*

CIVIL PROCEDURE: *Trial - Conduct of proceedings - Control of - Whether in hands of judge or of litigant - Agreement by parties to resolve or determine issues of fact - Whether tantamount to dictating how trial court should conduct its proceedings - Whether such agreements should always be upheld by the courts - Overriding need for expedient and inexpensive disposal of cases in contentious litigation*

The plaintiffs (the joint-owners of a piece of land) had earlier entered into a joint-venture agreement ('the JVA') with the defendant whereby the latter would develop a part of the land into a complete housing estate within three years thereof. As it transpired, the defendant was unable to perform his part of the JVA within the stipulated time and the plaintiffs gave the defendant notice of their intention to terminate the JVA. The land was subsequently sold to a third party and the plaintiffs brought an action in the High Court for a declaration that the JVA had been rescinded, damages for breach of contract and special damages. At the first hearing of the action, counsel for the plaintiffs tendered a document ('encl. 37') which he described as a 'consent order' and informed the court that the parties had reached a settlement. The learned judge, however, held that the parties were not bound by encl. 37 and that there was no consent order between the parties as she had not made any orders respecting encl. 37. In deciding that the action should proceed to trial, the learned judge also held that encl. 37 amounted to an attempt by the parties to dictate to the court how it should conduct its proceedings.

On appeal by the 1st plaintiff, the Court of Appeal – by a majority decision (per Mokhtar Sidin and Mohd Saari Yusoff JJCA with Abdul Aziz Mohamad JCA dissenting) – upheld the decision of the High Court and affirmed the right of the learned judge to refuse to record encl. 37. The justices of appeal agreed with the learned judge that there was no consent order or judgment and that encl. 37 was an untenable attempt by the litigants to dictate the terms and procedure of the trial. Aggrieved, the plaintiffs appealed to the Federal Court. The questions of law for which leave to appeal was granted were: (1) whether the parties to a civil action in the High Court are bound by the agreement reached between themselves on the mode and manner of determining certain issues of fact which are the subject matter of the proceedings; and (2) whether such an agreement by the parties amounts to dictating how the trial court should conduct its proceedings.

Held (allowing the appeal)
Per Mohd Noor Ahmad FCJ delivering the judgment of the court:

[1a] The learned judge should have, in the first place, considered the proposed settlement between the parties on its own. This was because the proposed settlement was itself a **contract**. The learned judge should have considered its effect and whether it was binding on the plaintiffs and the defendant. She ought to have inquired into and examined the facts which lead to the proposed settlement and decided whether it was binding on the parties based on the incidents of contract. If she should decide that it was binding on the parties, then neither the plaintiffs nor the defendant should be allowed to resile from it, and she should make an order in terms according to the merits of the facts. On the contrary, and fallaciously, the learned judge proceeded, instead, to consider (and thereafter base her entire decision on) the fact that no consent order or judgment was ever recorded in respect of the proposed settlement in encl. 37. This was an injudicious exercise of discretion. (p 311 b-g)

[1b] The learned judge should also have considered the need – in civil procedure – to expedite the disposal of cases with a view to saving costs and reducing delays. Agreements between litigants are a common and necessary feature in the conduct of contentious litigation. The parties are encouraged to co-operate with one another because it facilitates the speedy disposal of cases. The learned judge could and should have made use of encl. 37 as an opportunity to dispose of the plaintiffs' action expeditiously. (pp 311 h & 312 a-e)

[1c] On the facts, encl. 37 was a valid agreement – as reached between the plaintiffs and the defendant – on the mode and manner of determining certain issues of fact in the plaintiffs' action. The defendant should **not** have been allowed to resile from encl. 37 merely because it turned out to be unfavourable to him. (p 312 f-g)

[1d] The answer to question (1) would, therefore, be in the affirmative – subject to the caveat that the terms of the agreement did not contravene the law or any rules of procedure or of court and that they were agreed to and accepted by the court. Such agreements need **not** necessarily be recorded as consent orders unless the court before which they are manifested so wishes. (pp 312 h & 313 a)

[2] The control of the proceedings always rests with the judge, and the parties to an action cannot be regarded as dictating how the court should conduct its proceedings merely because they have reached a binding agreement on the mode and manner of determining certain issues of fact in the action. Question (2) could, therefore, be answered in the negative. However, **even** in a case where, by such an agreement, the parties **seem** to be 'instructing' the trial court on how to conduct the proceedings, that agreement should not be rejected by the court if it facilitates the expedient and inexpensive disposal of the case. (pp 310 c-h, 313 b-d, 314 f-h & 315 a-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif-plaintif (pemilik bersama sebidang tanah) sebelum ini telah memeterai satu perjanjian usahasama ('JVA') dengan defendan di mana defendan akan memajukan sebahagian dari tanah untuk dijadikan taman perumahan yang lengkap dalam masa tiga tahun. Defendan, walaupun begitu, telah gagal melaksanakan tanggungjawabnya di sisi JVA dalam tempoh yang ditetapkan dan plaintiff-plaintif memberi notis kepada defendan untuk menamatkan JVA. Tanah tersebut kemudian dijual kepada pihak ketiga dan plaintif-plaintif memulakan tindakan di Mahkamah Tinggi untuk deklarasi bahawa JVA telah dibatalkan, gantirugi kerana pelanggaran kontrak dan gantirugi khas. Di pendengaran pertama tindakan, peguam plaintif telah mengemukakan dokumen ('encl. 37') yang beliau panggil 'perintah persetujuan' dan memberitahu mahkamah bahawa pihak-pihak telah mencapai suatu persetujuan. Yang arif hakim, bagaimanapun, memutuskan bahawa pihak-pihak tidak terikat dengan encl. 37 dan bahawa tidak wujud apa-apa perintah persetujuan di antara pihak-pihak disebabkan beliau tidak pernah membuat apa-apa perintah mengenai encl. 37. Dalam memutuskan bahawa tindakan harus dibicarakan, yang arif hakim juga mendapati bahawa encl. 37 adalah satu percubaan oleh pihak-pihak untuk mengarah mahkamah tentang bagaimana ia harus menjalankan prosidingnya.

Semasa rayuan oleh plaintif pertama, Mahkamah Rayuan – melalui keputusan majoriti (oleh Mokhtar Sidin dan Mohd Saari Yusoff HHMR dengan Abdul Aziz Mohamad HMR menentang) – mengekalkan keputusan Mahkamah Tinggi dan mengesahkan hak yang arif hakim untuk enggan merekodkan encl. 37. Hakim-hakim rayuan bersetuju dengan yang arif hakim bahawa tidak wujud apa-apa perintah persetujuan atau penghakiman dan bahawa encl. 37 adalah satu percubaan yang tidak boleh dipertahankan oleh pihak-pihak yang bertikai untuk menetapkan terma-terma dan prosedur perbicaraan. Terkilan, plaintif-plaintif merayu ke Mahkamah Persekutuan. Persoalan undang-undang di mana izin baginya telah diberi adalah: (1) sama ada pihak dalam sesuatu tindakan sivil di Mahkamah Tinggi terikat dengan perjanjian yang dibuat di antara mereka berkaitan bentuk dan cara menentukan isu-isu fakta tertentu yang menjadi halperkara prosiding; dan (2) sama ada perjanjian sedemikian oleh pihak-pihak merupakan suatu arahan kepada mahkamah bicara tentang bagaimana ia harus mengendalikan prosidingnya.

Diputuskan

Oleh Mohd Noor Ahmad HMP (menyampaikan penghakiman mahkamah):

[1a] Yang arif hakim, pertamanya, harus menimbang cadangan penyelesaian yang dibuat oleh pihak-pihak tersebut. Ini kerana cadangan penyelesaian itu secara tersendiri adalah suatu kontrak. Yang arif hakim seharusnya menimbang kesan-kesannya dan sama ada ia mengikat plaintif-plaintif dan defendan. Beliau harus meneliti dan memeriksa fakta-fakta yang membawa kepada cadangan penyelesaian dan memutuskan sama ada ia mengikat pihak-pihak berdasarkan unsur-unsur kontrak. Sekiranya beliau memutuskan bahawa ia mengikat pihak-pihak, maka kedua-dua plaintif dan defendan tidak harus dibenarkan lari darinya, dan beliau harus membuat perintah sepatutnya mengikut merit fakta-fakta. Yang arif hakim, malangnya, dan dengan secara salah, telah memberi pertimbangan (dan selepas itu mendasarkan keseluruhan keputusannya) kepada fakta bahawa tiada perintah persetujuan atau penghakiman pernah direkodkan berhubung cadangan penyelesaian dalam encl. 37. Ini suatu pelaksanaan budibicara yang tidak berkehakiman.

[1b] Yang arif hakim juga sepatutnya menimbang akan keperluan – di dalam prosedur sivil – untuk mempercepatkan penyelesaian kes-kes dengan tujuan untuk mengurangkan kos dan kelengahan. Perjanjian-perjanjian di antara pihak-pihak yang bertikai adalah satu ciri biasa dan perlu dalam pengendalian litigasi. Pihak-pihak adalah digalakkan untuk bekerjasama

di antara satu sama lain sebab ia membantu mempercepat penyelesaian kes. Yang arif hakim boleh dan sepatutnya mengambil peluang menggunakan encl. 37 bagi menyelesaikan tuntutan plaintif-plaintif dengan secepatnya.

[1c] Berdasarkan fakta, encl. 37 adalah satu perjanjian yang sah - seperti yang dimeterai oleh plaintif dan defendan – berkaitan bentuk dan cara memutuskan isu-isu fakta tertentu dalam tindakan plaintif. Defendan tidak harus dibenarkan lari dari encl. 37 cuma kerana ianya terbukti tidak bermanfaat kepadanya.

[1d] Jawapan kepada soalan (1) dengan itu haruslah secara afirmatif – tertakluk kepada kaveat bahawa terma-terma perjanjian hendaklah tidak menyalahi undang-undang atau mana-mana peraturan prosedur atau mahkamah dan bahawa terma-terma tersebut dipersetuji dan diterima oleh mahkamah. Perjanjian-perjanjian seperti itu tidak semestinya direkodkan sebagai perintah persetujuan melainkan jika mahkamah di hadapan mana ianya dibawa inginkan begitu.

[2] Kawalan prosiding adalah sentiasa berada di tangan hakim, dan pihak-pihak kepada sesuatu tindakan tidak boleh dianggap sebagai telah memberi arahan kepada mahkamah semata-mata kerana mereka memeterai satu perjanjian yang mengikat berkaitan bentuk dan cara bagaimana isu-isu fakta tertentu dalam tindakan tersebut harus diputuskan. Persoalan (2) dengan itu harus dijawab secara negatif. Namun begitu, jikapun wujud kes di mana, melalui perjanjian-perjanjian sedemikian, pihak-pihak kelihatannya telah 'mengarahkan' mahkamah bicara tentang bagaimana ia harus menjalankan prosiding-prosiding, perjanjian itu tidak harus ditolak oleh mahkamah jika ia dapat membantu penyelesaian kes dengan bermanfaat dan murah.

Case(s) referred to:
Ashmore v. Corporation of Lloyd's [1992] 2 All ER 486 ***(refd)***
Leow Seng Huat v. Low Mui Yien [1996] 2 BLJ 466 HC ***(refd)***
Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 CLJ 845 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 33 r. 2, O. 34

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 37, para 390, p 286

For the 1st plaintiff/appellant - MS Murthi; M/s Murthi & Partners
For the defendant/respondent - Murali Achan; M/s K Kulasekar, Achan & Assocs

[Appeal from Court of Appeal, Kuala Lumpur; Civil Appeal No: W-02-32-97]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Noor Ahmad FCJ:

1. In this appeal, leave to appeal was granted on the following questions:

(1) Whether the parties in a civil action in the High Court are bound by the agreement reached between them on the mode and manner of determining the issues which are the subject-matter of the proceedings in the trial court?

(2) Whether the said agreement by the parties to the action amounts to dictating to the court by the parties as to how it should conduct its proceedings?

2. (1) The dispute between the parties arose out of a written joint venture agreement (the agreement) entered into between both plaintiffs and the defendant on 17 December 1974. The plaintiffs were joint owners in equal shares of a piece of land held under EMR No. 2155, Lot No. 1189 in the Mukim and District of Klang, Selangor (the Land). Under the agreement the second plaintiff was to sell half of his undivided share of the land to the defendant. The defendant was to develop the land into a housing estate. Some of the obligations of the defendant under cl. 5 of the agreement are, that the defendant was required to apply for conversion of the land from agricultural to housing at his own expense, to cause or take such steps necessary for the purpose of securing approval for sub-division of the land from the relevant authority at his own expense, to prepare plans for the construction of single storey terrace houses on the land and to construct the houses to the minimum size as prescribed, and upon completion, to allot the houses between them in the ratio as stipulated and to complete the construction of the houses within three years from the date of the agreement.

(2) The defendant was unable to carry out his obligations within the stipulated period. As such, the plaintiffs, through their solicitors gave the defendant a written notice to terminate the agreement. At this point of time, the first plaintiff, at the defendant's request, had paid the sum of RM17,408 as conversion fee and RM9,000 for drainage and irrigation fees. Upon receipt of the notice, the defendant approached the plaintiffs for the agreement to be vacated and a new joint venture agreement be substituted in its place. The plaintiffs indicated their agreement to the defendant, conditional upon certain terms being included in

the new joint venture agreement, which, *inter alia*, the defendant to reimburse the first plaintiff a sum of RM26,408 being the conversion, drainage and irrigation fees and a sum of RM27,619.75 being quit rent paid by the plaintiffs and the defendant to deposit a sum of RM60,000 as security. The defendant did not agree and the new joint venture agreement did not come into being. Consequently, the plaintiff, through their solicitors, made a written demand on the defendant claiming, amongst others, for the reimbursement of the conversion, drainage and irrigation fees, the defendant's share of the quit rent and assessment already paid by the plaintiffs.

(3) Subsequently, the land was sold to a third party with the agreement of the plaintiffs and the defendant, as joint owners. The proceeds of the sale were distributed between them according to their respective shareholding.

3. In the action, the plaintiffs sought a declaration that the agreement has been rescinded, damages for breach of the agreement, special damages in the sum of RM47,366.60 comprising of the aforesaid fees, quit rent, assessment and interest. In the statement of defence, the defendant pleaded frustration and denied the plaintiffs' claim for reimbursement of the fees, quit rent and the assessment.

4. (1) The learned trial judge found two points were in dispute. Firstly, whether or not the conversion, drainage and irrigation fees, the quit rent and assessment as claimed had been reimbursed to the first plaintiff from the proceeds of sale of the land to the third party? And, secondly, whether at the time of the execution of the sale & purchase agreement relating to the sale of the land to the third party, the first plaintiff had agreed to accept her portion of the proceeds of sale in full and final settlement of all the claims against the defendant?

(2) The appeal record reveals what transpired at the hearing before the learned trial judge. Briefly at the first hearing on 25 January 1996, in the presence of Mr. Achan, learned counsel for the defendant, Mr. Murthi, learned counsel for the plaintiffs, informed the court that parties had come to a settlement. He tendered a document which he termed it as a Consent Order. It was marked as "Lampiran A" (encl. 37). The document is not in the appeal record. Notwithstanding that, as its contents had been reproduced in the judgment of the learned trial judge, they may be summarized, *viz.* Mr. George Proctor, the solicitor acting as solicitor for all the parties to the sale & purchase agreement relating to the sale of the land to the third party was to be directed to file an affidavit deposing the statement of facts answering the aforesaid two points in dispute as found by the learned trial judge and the parties agreed to be bound by the statement of facts deposed, and further, if the said solicitor

failed, neglected or refused to do so, the parties could subpoena him to give evidence in open court. The hearing was adjourned to another date for Mr. G. Proctor to file the affidavit. At the next hearing, Mr. Murthi informed the court that Mr. G. Proctor had filed the affidavit which contained the statement of facts and as it favoured the first plaintiff he prayed for damages to be assessed. Mr. Achan applied for a short adjournment to enable him to get instruction from his client as Mr. G. Proctor's affidavit was served on him only a day earlier. The hearing was adjourned. Subsequently, Mr. Achan discharged himself and Mr. A. Murali took over the case. Finally, at the resumed hearing the parties submitted on the issue of whether the parties are bound by the so-called Consent Order.

(3) The learned trial judge concluded that as she did not make any order on encl. 37 there was no Consent Order at all. Further she said that by the terms in encl. 37 the parties were endeavouring to dictate to the court on how it should conduct its proceedings. As such, she directed the case to proceed to trial. The first plaintiff appealed.

5. The Court of Appeal by a majority decision (Mokhtar Sidin and Mohd. Saari Yusoff JJCA) agreed with the learned trial judge and dismissed the appeal. The Court of Appeal said:

> The learned judge, in my view, was within her right in refusing to record enclosure (37) as consent judgment. In my view, the learned judge would be in error if she had acceded to the plaintiffs' counsel's request to have that enclosure recorded as consent judgment when there was sufficient evidence to show that the defendant and his counsel objected to it. I am of the view, the learned judge was right when she said that this was an attempt by the plaintiffs' counsel to dictate the terms and procedure of the trial which is not permitted by *Ashmore v. Corp of Lloyd's* [1992] 2 All ER 486 where it was held:
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> > The control of proceedings was always a matter for the trial judge and the parties were not entitled as of right to have their case tried to a conclusion in such manner as they thought fit and if necessary after all the evidence had been adduced and could have no legitimate expectation that such a course would be followed. A party's only legitimate expectation was that he would receive justice, which could only be achieved by assisting the judge and accepting his rulings.

Abdul Aziz Mohamed JCA dissented.

6. (1) On the facts, we are satisfied that originally, the parties appeared to have agreed to the terms as embodied in encl. 37 relating to the mode and manner of determining the issues in the action. However, subsequently, the defendant resiled from the agreement and the learned trial judge allowed the defendant to do so as she held that encl. 37 is not a Consent Order.

(2) Several authorities were cited by the parties before the High Court and the Court of Appeal. Learned counsel for the plaintiffs contended that the case of *Leow Seng Huat v. Low Mui Yien* [1996] 2 BLJ 466 was on all fours with the case at hand. In that case, three Consent Orders were made by the court which the defendant disobeyed. In the contempt proceedings, the defendant claimed that she had never authorised her former counsel to agree to the consent orders. The issue was whether she was bound by the consent orders. The learned judge in that case held that she was bound notwithstanding the lack of authorisation. However, the learned trial judge in the present case held that the case had no relevance to the present case because in the former, the consent orders had been perfected and whereas in the latter, there was only a proposed order which had not been given effect by the court. The Court of Appeal agreed with her. We agree. Before the Court of Appeal, counsel for the first plaintiff also relied on the case of *Visia Finance Bhd. v. Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 CLJ 845. In that case, the appellant entered into two master agreements with the first respondent for a credit facility. The second and third respondents provided two written guarantees for the due performance of the first respondent's obligations under both agreements. At the request of the appellant the respondents provided a novation letter as an additional security. In the action by the appellant to recover the sum due under the agreements, the respondents contended that both the guarantees were void for uncertainty, and if not void, they were superseded by the alleged novation. At the date of the trial, both counsel agreed that the issue as to whether the guarantees were void for uncertainty be decided as a preliminary issue. The learned judge ruled that the guarantees were not void for uncertainty and the guarantors were therefore liable to the appellant and the only issue remaining to be disposed of was the quantum. However, the respondents' counsel subsequently submitted that only the issue of the validity of the guarantees had been decided but not the novation and therefore the respondents should be permitted to call evidence on it. The learned judge allowed and the appellant appealed. The Court of Appeal in allowing the appeal held that where both counsel had consented to proceed in a particular way, an order made by consent, in the absence of fraud, could only be varied by consent, and it would be a denial of justice to permit a party to resile from what his counsel had decided for him merely because

he lost. The Court of Appeal in the present case distinguished that case and this case. In the former, the court had made a ruling on the issue before the court which counsel for both parties had agreed to be decided first, and whereas in the latter, the learned trial judge in the exercise of her discretion refused to record the proposed order as consent judgment because the defendant objected. The Court of Appeal did not disturb the exercise of her discretion as it was within her right in refusing to do so. Learned counsel for the defendant relied on the case of *Ashmore v. Corporation Of Lloyd's* [1992] 2 All ER 486 HL in asserting that it was not for the parties or their counsel to dictate to the court what evidence to be adduced and what procedure to be adopted. Both the learned trial judge and the majority of the judges of the Court of Appeal accepted the assertion. However, the dissenting judge of the Court of Appeal cited the following *dicta* of Lord Templeman and Lord Roskill, respectively:

> My Lords, I disagree; the control of the proceedings rests with the judge and not with the plaintiffs. An expectation that the trial would proceed to a conclusion upon the evidence to be adduced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge and accepting his rulings.
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> The Court of Appeal appeared to have taken the view that the plaintiffs were entitled as of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues. That was what Gatehouse J, in my view entirely correctly, sought to achieve by the order which he made, an order which as all your Lordships agree should be restored.

And he opined that those dicta of the two Law Lords are not appropriate to be used as authority for saying that where parties have agreed on an expeditious way of determining the dispute between them, they are dictating to the court about the manner of resolving the dispute and therefore the court may, for no better reason than that the manner chosen and agreed to will result adversely for one party, hold him not bound by the agreement. We agree with him for the reason as stated hereinafter.

In our view, two separate issues are involved in this appeal. Firstly, whether the parties are bound by the agreement on the terms contained in encl. 37? And, secondly, whether by the agreement the parties were endeavouring to dictate to the court on how it should conduct its proceedings? The issues are to be decided separately and on different principles.

8. (1) On the first issue, which is related to question (1), a consent judgment or order is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the court, and its force and effect derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent judgment or order. A consent order must be given its full contractual effect, even if it relates to an interlocutory step in the action (see para. 390 @ p. 286, *Halbury's Laws of England*, 4th edn vol. 37). We gather from this proposition that (i) the agreement on the terms reached between the parties at the interlocutory stage of an action is a contract between the parties and (ii) the consent judgment or order arising out of that contract is also a contract between the parties except that the latter is superadded with the command of the court. In short, there are two contracts, one, before the court makes the order and two, after the order is made. After the order is made the first contract merges into the second contract. That being the case, short of the order being made, the first contract will have to be separately considered on its binding effect based on incidents of a contract. This statement is relevant to the present appeal in which the first contract is involved as no order had been made by the court. The learned trial judge should have proceeded in the first place to consider solely on the binding effect of the first contract without regard as to whether or not the court had made any order thereto. For the purpose, she should have inquired into the facts leading to the agreement and examined the facts and then decided on its binding effect based on the incidents of a contract. And if she considers that the first contract binds the parties then no party ought to be allowed to resile from it but to make an order in terms according to the merits of the facts as deposed in the affidavit of Mr. G. Proctor. Instead, by necessary implication, she proceeded to consider on the binding effect of the first contract simultaneously with the second contract when she opined that no Consent Order was made at all on the first contract. In short, her decision was simply based on the lack of an order made by the court in respect of the first contract. With due respect, she had failed to exercise her discretion judiciously.

(2) The learned trial judge should have also considered on the need to expedite the disposal of the case with a view of saving costs, reducing delays and minimizing the burden of the court. Our civil procedure had been revamped from time to time for the purpose. One example is the case management

procedure (O. 34 of the Rules of the High Court 1980 (the RHC)). The significance of this procedure is that it marks a change from the traditional position under which the progress of cases was left largely in the hands of the parties. Now, under the procedure the court controls the progress of cases by the exercise of its powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedures applicable during that stage are complied with promptly and not abused. The other example is the procedure under O. 33 r. 2 of the RHC which states that the court may order any question or issue arising in any cause or matter, whether of fact or law or partly of fact or partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. As a complement to the procedure the parties are encouraged to co-operate with each other in the conduct of the proceedings because their co-operation is necessary to facilitate the speedy disposal of cases. Thus, agreements between parties are common and necessary features of the conduct of civil litigation. Parties agree to many things about matters relevant to the case between them, such as to documents, to facts, to limit the issues and not to proceed on certain pleaded issues and to accept allegations of facts by the other side as true only for a particular purpose. In the case at hand, the opportunity to dispose of the case expeditiously initially arose before the learned trial judge. In our view, by reason of the aforesaid, she ought to have made use of that opportunity by considering the binding effect of the first contract in the manner as aforesaid. The opportunity was lost. Therefore, in our view, the manner of determining the first issue by her is not in consonance with the objective of our civil procedure.

(3) Be that as it may, we are in a position to determine the issue. There are sufficient materials before us for the purpose. The contents of encl. 37 were not disputed. Mr. G. Proctor had complied with what was required of him to do. He had filed the affidavit deposing the statement of facts answering the two points in dispute which the parties had agreed to be bound. On these facts, we are satisfied on the balance of probabilities that, based on the incidents of a contract, there was a valid agreement on the terms reached between the parties on the mode and manner of determining the issues in the proceedings. We are also satisfied that the defendant resiled from the agreement simply because the statement of facts as deposed by Mr. G. Proctor in the affidavit was unfavourable to him. Therefore, the answer to question (1) is in the affirmative. However, it is subject to a caveat that none of the terms of the agreement are contrary to or in breach of any law or the RHC or any other rules and the agreement is agreed to and accepted by the court. We wish to emphasise that the fact of such agreement and acceptance by the court does not mean that

the agreement is to be regarded as a Consent Order unless so ordered by the court. We have scrutinised the contents of encl. 37. We are satisfied that none of the terms are repugnant to any law, the RHC or any other rules.

9. (1) The second issue is relevant to question (2). It is trite law that it is the judge and not the parties who is in control of the proceedings. And also it is well-settled that an expectation that the trial would proceed to a conclusion upon the evidence to be adduced is not a legitimate expectation of the parties. The sole legitimate expectation of any party in the action is to receive justice and justice can only be achieved by assisting the judge and accepting his rulings (see *Ashmore v. Coporation Of Lloyd's, supra*). Therefore, in our view, having regard to the objective of our civil procedure which encourages the parties to co-operate with each other in the conduct of the proceedings and that agreement between the parties on many things about matters relevant to the case between them as aforesaid are not uncommon, it is a fallacy to hold that, where the parties have agreed on an expeditious way of determining the dispute between them, they are dictating to the court about the manner of resolving the dispute and therefore, solely on that ground their agreement should not be considered. The collateral reason given by the learned trial judge in not considering the agreement is that the manner chosen and agreed to by the parties would result adversely against one party and therefore, the party should not be bound by the agreement. The majority of the judges of the Court of Appeal agreed with her. With due respect, we do not agree because to our mind, if the parties had chosen and agreed as to the manner of resolving the dispute between them they will have to bear whatever is the outcome. The threshold question is whether there was a binding agreement between the parties to settle the dispute in that manner? For the answer to this question, the learned trial judge will have to conduct the proceedings as aforesaid. And if the agreement is found to be binding, the dispute can be solved in the manner as agreed to by the parties and the case can be disposed of expeditiously; thus, saving time and costs. We are fortified in our view by the approach taken by the Law Lords in the case of *Asmore v. Corporation Of Lloyd's, supra*. In that case, on the application of the defendant, the trial judge, Gatehouse J, allowed the question whether in law the defendant owed to each plaintiff any, and if so which, of the duties of care alleged in the points of claim and arising out of the plaintiffs' membership of the defendant to be tried as a preliminary issue. Apparently it was allowed on the ground of expediency and in the interest of saving time, costs and harassment of witnesses. The plaintiffs appealed to the Court of Appeal, contending *inter alia*, that the points of law ordered by the trial judge to be tried did not cover the plaintiffs' case that there was a duty in tort and could not be decided in advance of oral evidence concerning certain admissions

alleged to have been made by the defendant. The Court of Appeal allowed the appeal. However, it recognized the need to resolve the main issues of law in the case without the added expense of a full trial of liability on all the evidence. This is evident from what Ralph Gibson LJ said:

> I think it not improbable that the order made by Gatehouse J, if allowed to stand would produce decisions of law which would fairly resolve the effective issues of law between the plaintiffs and Lloyd's, one way or the other; and I have much sympathy with his general view of these proceedings, that, in the events which happened, it would probably be in the interest of both sides if the main issues of law could be properly resolved without the added expense of a full trial of liability on all the evidence.

The defendant appealed to the House of Lords. The appeal was allowed and Gatehouse J's decision was restored as there were no good grounds for appellate interference. The House of Lords recognized the need to dispose of the dispute between the parties without further delay, expense or harassment of witnesses. This is echoed through the statement of Lord Templeman, *viz*:

> It will be necessary for the judge eventually to decide whether Lloyd's owe any duty in law to each of the plaintiffs. It seems sensible that this decision should be made at the outset of the trial. If the decision is in favour of the plaintiffs, the judge, having defined the relevant duty may logically proceed to hear evidence in order to decide whether Lloyd's acted in breach of duty and the consequences of any breach. If Lloyd's owed no duty to each plaintiff then the action will be at an end without further delay, expense or harassment of witnesses.

What can be deduced from the case is this. The control of the proceeding is in the hand of the trial judge. Parties are not entitled as of right to have their case tried to a conclusion in such manner as they think fit. A party's only legitimate expectation is that he would receive justice which can only be achieved by assisting the judge and accepting his rulings. Hence, in a fitting case, where the judge decides on the manner of the disposal of a case on the ground of expediency and in the interest of saving time and costs the decision should not be subject to appellate interference. In our view, by necessary implication, the defendant's (Lloyd's) application to have the case disposed of in the manner as decided by Gatehouse J, although it may tantamont to a party dictating to the court as to how it should conduct its proceedings, that factor by itself should not be a ground for the rejection of the application if the manner for the disposal of the case applied for is expedient and in the interest of saving time and costs. Likewise in the present case, we are of the view that although the agreement by the parties as to the manner of resolving the dispute between them may amount to dictating to the court as to how it should

conduct its proceedings, that factor by itself should not be the reason for the learned trial judge to reject the manner as agreed by the parties. The duty of the learned trial judge is to exercise her discretion in deciding whether the manner of resolving the dispute between them as agreed by them is expedient for the disposal of the case in the interest of saving time, costs and the harassment of witnesses. In order to do this, she would have first to conduct the inquiry and examination of the facts leading to the agreement as aforesaid and then to decide on its binding effect. Of course, there are differences in situations between that case in the House of Lords and the present case. In that case, the application for the issues of law to be tried first was made by a party and whereas in the present case, by both parties and in that case, the trial judge had exercised his discretion judiciously and whereas in the present case the trial judge had exercised her discretion wrongly and therefore, subject to an appellate interference. Be that as is may, the differences are irrelevant as they do not derogate from the principles established in that case as aforesaid.

(2) Therefore, the answer to question (2) is that the control of proceedings is always a matter for the trial judge. However, the parties to the action may agree as to the manner of settling their dispute. If the court accepts their agreement, surely they cannot be said to be dictating to the court as to how it should conduct its proceedings.

10. Therefore, as the learned trial judge had not exercised her discretion judiciously we are entitled to interfere. However, from the record of appeal we observe that in compliance with the decision and order of the learned trial judge, the trial had proceeded and, the defendant being absent, judgment in default had been entered against him. That judgment is valid until set aside. Under the circumstance, in our view, the proper order to be made by us is just to allow the appeal. Hence, we allow the appeal. We make no order as to costs since the parties had agreed that no order as to costs be made for the proceedings at all stages. The deposit is to be refunded to the plaintiffs.